

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

YOUNG BROADCASTING d/b/a KCAL-TV

Employer

and

Case No. 31-RC-7773

LOCAL 45, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:³

Unit A. INCLUDED: All promotional writer/producers employed by the Employer at its facility located at 5515 Melrose Avenue, Hollywood, California.

EXCLUDED: On-air talent, show producers, directors, technicians, clerical employees, all other employees, guards and supervisors as defined in the Act.

Unit B. INCLUDED: All show producers employed by the Employer at its facility located at 5515 Melrose Avenue, Hollywood, California.

EXCLUDED: On-air talent, promotional writer/producers, directors, technicians, clerical employees, all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION⁴

Elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the times and places set forth in the notices of elections to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election dates and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 45, International Brotherhood of Electrical Workers, AFL-CIO.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list for each of the 2 units of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *National Labor Relations Board v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of each of the election eligibility lists, containing the **FULL** names and addresses of all the eligible voters shall be filed by the Employer with the undersigned who shall make the lists available to all parties to the elections. In order to be timely filed, such lists must be received in the office of Region 31, 7th Floor, 11150 W. Olympic Boulevard, Los Angeles, California 90064-1824, on or before **October 4, 1999**. No extension of time to file these lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **October 12, 1999**.

DATED at Los Angeles, California this 27th day of September, 1999.

/s/ James J. McDermott

James J. McDermott, Regional Director
National Labor Relations Board
Region 31
11150 West Olympic Blvd., Suite 12100
Los Angeles, CA 90064-1824

FOOTNOTES

1. In its post hearing brief the Employer moved to re-open the record in this case should I find the substitute show producer a dual function employee appropriately included in the petitioned-for unit. As discussed below, I have excluded the substitute show producer from the units found appropriate herein. Accordingly, the Employer's motion to re-open the record is moot.
2. The Employer, Young Broadcasting d/b/a KCAL-TV, is a Delaware corporation engaged in the operation of a television broadcasting station in Hollywood, California. During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$100,000. During the same representative period, the Employer sold services valued in excess of \$5,000 directly to enterprises located outside the State of California. In the conduct of its business, the Employer subscribes to national wire services and advertises national brand products. The Employer thus satisfies the statutory, as well as the Board's discretionary standards for asserting jurisdiction. *Raritan Valley Broadcasting Co., 122 NLRB 90 (1959)*.

3. A. PROPOSED PETITIONER UNIT

The Petitioner seeks a unit composed of all show producers and promotional writer/producers (also referred to in the record as promo news/producers but referred to in this decision, based on the title in their job description, as promotional or promo writer/producers). The Petitioner contends that the show producers and promo writer/producers are not supervisors. The Petitioner also contends that the weekend show producer and substitute show producer are dual function employees and should be included in the show producer unit (both are already included as associate producers in the unit in Case 31-RC-7766).

According to the Petitioner, the show producers and promo writer/producers share a sufficient community of interest to be included in a unit together. Petitioner has indicated that it will proceed to an election in any unit found appropriate and submits that if it is determined that the show producers and promo writer/producers do not share a sufficient

community of interest, it is willing to proceed to an election in separate units for both groups of employees.

B. PROPOSED EMPLOYER UNIT

The Employer contends that the show producers are supervisors and were agreed by Petitioner to be supervisors in Case 31-RC-7766. The Employer also contends that the weekend show producer and substitute show producer are not dual function employees and it would be inappropriate for them to be eligible to vote in the petitioned-for unit. Finally, the Employer contends that the two promo writer/producers do not share a sufficient community of interest with the show producers and should not be eligible to vote in any election with show producers.

C. BACKGROUND

The Employer, Young Broadcasting d/b/a KCAL-TV (herein KCAL), is an independent television station in Los Angeles, California. Its main facility is at 5515 Melrose Avenue in Los Angeles. The KCAL News Department is located several hundred yards from the main Melrose facility on a soundstage at the Paramount Studios lot. KCAL broadcasts various news, sports and syndicated programs. It produces and broadcasts five-and-a-half hours of news each weekday, at 12:00 noon, 2:00p.m., 3:30p.m., 8:00p.m., 9:00p.m. and 10:00p.m. It also produces two one-hour news broadcasts on weekends at 9:00 p.m..

KCAL employs about 250 employees. About 12 craft employees are represented by IATSE. The associate directors and stage managers are represented by the Directors Guild of America. AFTRA represents the Employer's 20 on-air newsmen and the announcer. There are approximately 80 technicians, including cameramen and tape editors, who are represented by the Petitioner in another bargaining unit.

Finally, pursuant to a petition filed by Petitioner in Case 31-RC-7766 and a stipulated election agreement, Petitioner was certified September 23, 1999 as the representative of a unit of various news department staff members. In Case 31-RC-7766 the parties agreed to exclude show producers from the unit for purposes of the election in that matter but there is

no indication that the parties stipulated by the exclusion that the show producers were supervisors within the meaning of Section 2(11).

While the Employer contends in its brief that the petition in this case should be dismissed because it believed the Petitioner agreed in 31-RC-7766 the show producers are supervisors, it cites no legal basis to establish dismissal is required. In light of my findings herein, I conclude the petition herein should not be dismissed.

The departments of KCAL that are relevant to the present proceeding are the News Department and the Advertising and Marketing Department. There are approximately 120 employees in the News Department. They include, among others, anchors, reporters, photographers, editors, assignment desk employees and writers.

The News Director is responsible for the News Department. A senior executive producer reports to the News Director. Below the senior executive producer are two executive producers. Below the executive producers are the six show producers, each of whom produces either a half-hour or one-hour news show daily. There is also a weekend show producer who produces the two hours of weekend news. One of the regular weekday producers had been on maternity leave and an associate producer had been substituting for her while she was on maternity leave. This fill-in associate producer has also substituted on other occasions when show producers are unavailable. The potential dual function status of the weekend show producer and substitute show producer/associate producer will be discussed, *infra*.

The Advertising and Marketing Department is a separate department, geographically and organizationally, from the News Department at KCAL. The Vice President of Advertising and Marketing is in charge of the department. Under him are the announcer, Director of Art and Design, Manager of Sales Promotions and Manager of On-Air Promotions. The promo writer/producers are below the Manager of On-Air Promotions. The Manager of On-Air Promotions was stipulated to be a supervisor at the hearing.

One of the functions of the Advertising and Marketing Department is to build and boost ratings for KCAL through a variety of means including external advertising and

promotions. Promotional announcements, herein promotions or promos, are commercials for KCAL programs aired on KCAL. Promotions generally run outside the KCAL broadcast program during commercial time while "teasers" are generally included within the program and "tease" what will be following on the newscast, or other program, after the commercials.

The Vice President of Advertising and Marketing is responsible for sales promotions, art and graphics, and on-air promotions. His subordinates (except the announcer), work in KCAL's building at 5515 Melrose. On-air promotions are overseen by the Vice President of Advertising and Marketing and the Manager of On-Air Promotions. Neither of them supervise any news department employees.

There are two promo writer/producers in the Advertising and Marketing On-Air Promotions department. One writes promotions for KCAL sports programs. The other writes promotions for, among other things, syndicated KCAL programs and KCAL news programs. Neither employee produces any newscasts. The promotions are aired during commercial breaks during broadcasts. The two promo writer/producers also work on promotions for syndicated programming, public service announcements and other KCAL promotions and programming.

D. SHOW PRODUCERS

As noted, there are six weekday show producers. There is also a weekend show producer (who is an associate producer during the week) and a substitute show producer who is an associate producer when not filling in. Show producers have the responsibility to fill their allotted half-hour or hour with news. The record indicates that show producers have responsibility for all elements of their newscasts, including content, graphics, how reporters put together stories, content of stories, look of stories, and order and length of stories. Each half-hour of a newscast generally includes 20-30 news items.

The weekday show producers attend daily meetings with the executive producers, assignment desk editor and others. At these meetings the daily broadcasts are discussed. Show producers prepare a "rundown" for each newscast listing the stories to be covered and the

order of presentation. The news broadcast “rundowns” are somewhat flexible as they would have to be due to the changing nature of news itself. As a result, during the day, show producers can and do change the format of their broadcasts. Show producers generally choose the lead stories for their newscasts. The record indicates that the executive producer has the “final say” on issues in dispute between themselves and the show producers.

The record indicates that reporters are assigned by the assignment desk to prepare certain stories. The show producer determines the use of certain other stories in the newscast. These stories can be stories of local interest or they can be pulled off a wire service or other news service provider. Some show producers, such as the noon producer, choose to use more international news stories than other producers. The show producer determines the length and placement of stories.

In addition to length of the stories, the show producers determine the format for the show’s presentation. Others, including the assignment editor, generally determine which crews and reporters will cover certain selected stories. Show producers can tell the reporter the “angle” the story should be presented in and the form and length of the story. The record shows that this is not generally required however as most stories are fairly straight forward and do not have an “angle.” Show producers can change the presentation and usage of a particular story. They can choose not to run a story. Show producers cannot replace reporters.

Show producers request employees, including associate producers and writers, to write stories. The record indicates that a particular writer is generally assigned to a particular broadcast and that there are additional writers available to assist. The show producer does not chose the writer assigned to their broadcast. Show producers can assign particular stories to writers based on their perception of the writers' talents and prior knowledge of the

story, although the record indicates most stories are not assigned on that basis. The record indicates that certain show producers assign writers to assignments based on a rotational basis to balance the work load. Show producers, however, are not required to assign stories on a rotational basis. Show producers give suggestions to the writers, including designating the video clips to be used for a story and the camera instructions to be written into the story. If a writer does not come to work, a list of per diem writers is maintained by the assignment desk. The record indicates that a show producer may request a certain per diem writer but the request may not necessarily be honored.

Show producers review scripts and can and do request writers to redo work. Show producers determine the look of the newscast, including whether to use video with a story, when to use a voiceover, a graphic, or when to use a file tape. Show producers can also request associate producers perform certain tasks such as drafting "teasers" for upcoming news segments or preparing or ordering graphics. Show producers, as well as writers and associate producers, can ask production assistants to perform tasks. Show producers may on occasion give the anchor persons instruction on the reading, order, content, and necessity of a particular story. Show producers tell the newscast anchors which anchor will read which story. That decision may be based on the skills and talents of the particular anchors as they relate to specific stories. Some show producers, however, merely alternate the stories read by the anchors.

During the news broadcast, the show producer is seated behind the show director in the master control room. The director instructs the technical crew in accordance with the overall script assembled by the show producer. The show producer can and does make changes in the script, which are then implemented by the directors and anchors. The show producer can give minor directions to the anchors, such as to slow down or hurry up.

Show producers can purchase videotape shot by stringers (freelancers) but they are limited to three tapes per day. After three tapes they must secure upper management authorization to purchase the tapes. KCAL's policy is that overtime should be authorized or pre-approved by the executive producer or someone in upper management, but the record indicates that show

producers do authorize overtime if absolutely necessary; they do not do this on a routine basis.

The burden of proving supervisory status rests on the party alleging that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). The Board will refrain from constructing supervisory status too broadly because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*, 308 NLRB 101 (1992). In the present case it cannot be concluded that the Employer has proven that the show producers are supervisors.

Section 2(11) of the Act defines a supervisor as:

"Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In the present case, the record indicates that the show producers do not hire, fire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, adjust grievances, or effectively recommend any such actions.

Show producers do not send employees home early. They do not authorize vacation time. They do not grant salary increases. They are required to seek authorization to grant employees overtime unless there is some special situation. They do not evaluate employees. Any finding that the show producers are supervisors must necessarily rely on a finding that they assign work to certain employees which requires the use of independent judgment and that they responsibly direct employees using independent judgment. I conclude that the record does not support such a finding here.

The show producers clearly have substantial responsibility for putting the Employer's news broadcasts on the air. Most of that responsibility, however, does not involve Section 2(11) supervisory indicia. The case of *Golden West Broadcasting-KTLA*, 215 NLRB 760 (1974), is instructive in the present case. In *Golden West*, the Board concluded that show produc-

ers, very similar to those here, functioned as part of an “integrated production team.” So too do the show producers in this matter. The show producers alleged supervisory duties in the present case of, for example, assigning or directing the work of the writers, associate producers, or anchors, is of an arguably routine nature and is clearly more “artistic” than supervisory. Thus, while the show producers may exercise some discretion in executing their assignments, it is discretion based more on artistic concerns than upon true supervisory indicia. Additionally, the record makes it clear that the show producers do not affect the employment conditions or tenure of the KCAL employees.

The cases relied upon by the Employer in this matter are distinguishable from the present situation. In *WDTN-TV*, 267 NLRB 326 (1983), the news producers were found to be supervisors. And indeed, the duties discussed in that case are strikingly similar to the duties of the show producers in the present case. In *WDTN-TV*, however, the Board concluded that the news producers were supervisors based on their job duties and the fact the news producers were considered by employees to be supervisors, the news producers disciplined and effectively recommended discipline, they were required to talk to employees with work problems, they were required to submit written reports that could result in discipline, and they had wide discretion in authorizing overtime. These additional supervisory factors relied on by the Board are substantial and are missing from the present matter. The Board concluded that the news producers in *WDTN-TV* were supervisors as they responsibly directed the work of other employees and they possessed sufficient indicia of supervisory authority to warrant their exclusion.

So too in *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972), and *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971), the Board found that the news producers were supervisors based on their enumerated job duties and also because they possessed other supervisory indicia such as responsibility for the day-to-day supervision of the cameramen, news reporters, film processors and film editors, broad authority to authorize overtime, and attendance at monthly meetings to discuss company policies, budget, and talent. In addition, the news producers were considered part of the management and supervisory structure, were paid from supervisory payroll and were eligible for benefits only offered to supervisors or management. Again, these additional supervisor indicia are significant and

are not present in this matter. Without these additional indicia of supervisory authority, the case law does not support a finding that the KCAL show producers' responsibility and control over the news broadcasts constitutes Section 2(11) supervision.

The fact that the executive producer may on occasion solicit input from show producers on certain employees during evaluation periods does not confer supervisory status in the absence of evidence that the input constitutes an effective recommendation for a pay increase, promotion or other reward. *Arizona Public Service Co.*, 310 NLRB 477 (1993).

Also unavailing is the fact that the weekend show producer has no executive producer on site during her shows, particularly where it is clear there is established "back up" management for her to contact. *North Shore Weeklies Inc.*, 317 NLRB 1128 (1995). The record also makes clear that granting overtime, except in rare cases, is to be cleared with upper management. Show producers are not included in weekly management meetings. They are paid overtime. At least one show producer has been directly told she is not management. The weekend show producer was told there was no supervisor on weekends and thus she was as close as they had to a supervisor on weekends.

On balance, and after weighing all the factors as developed in the record, exhibits, and supporting briefs, I cannot find that show producers are supervisors under Section 2(11) of the Act.

E. DUAL FUNCTION EMPLOYEES

Petitioner contends that the weekend show producer and substitute show producer should be found to be dual function employees. A dual function employee is an employee who performs more than one function for the same employer. *Martin Enterprises, Inc.*, 325 NLRB No. 133 (1998). To determine the eligibility of a dual function employee, the Board uses the part-time employee test. *Textron Lycoming*, 308 NLRB 1045 (1992). The Board determines whether the employee "regularly performs duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's working conditions." *Martin Enterprises, supra*; *Continental Cablevision*, 298 NLRB 973 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987).

The weekend show producer produces the Saturday and Sunday one hour broadcasts. Three days a week during the regular work week she is an associate producer and part of the unit pursuant to Case 31-RC-7766. When she produces the weekend show, she performs the same duties as the weekday show producers, albeit without the benefit of an on-site executive producer (an executive producer or other management person, however, is on call). The record indicates that she spends roughly 40% of her regular work hours producing the weekend shows. Thus her interests are clearly aligned with the show producers, she has an interest in their working conditions and she should be allowed to vote in that unit.

The substitute show producer substitutes on an irregular and sporadic basis when regular show producers are ill, on vacation, on maternity leave, or unavailable for some other reason. The record indicates that she finished substituting for one of the weekday show producers just about the time the hearing in this matter commenced. When not substituting as a show producer, she spends her time as an associate producer. Based on her sporadic, irregular substitution as a show producer, it cannot be concluded that she is a dual function employee and that her interests are sufficiently aligned with the show producers. As a result, I conclude she is not eligible vote in the show producers unit.

F. PROMOTIONAL WRITER/PRODUCERS

Petitioner contends that the two promotional writer/producers for sports and news share a sufficient community of interest with the show producers to be included in the unit with them.

The sports promotional writer/producer's primary duty is to write promotions (commercials) for live professional sporting events carried on KCAL. She screens videotape of games, writes the announcer's script, and selects library music for the commercial. She also obtains art from the graphics department. After her scripts are approved by the Vice President of Advertising and Marketing or the On-Air Manager, they are recorded off-site by an announcer. Then, working with an editor from the production department, the elements of the promotion are put together for use on-the-air. Sports promotions range in

length from 10-30 seconds. The sports promo writer/producer has never worked in the news department in any capacity.

In determining whether a unit is appropriate, the Board examines whether the employees share a “community of interest.” Thus, do they share “substantial mutual interests in wages, hours, and other conditions of employment.” *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The Board considers numerous factors to determine community of interest including degree of functional integration, common supervision, employee skills, interchangeability and contact among employees, work situs, and general working conditions, but no one factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984).

The record indicates that the sports promo writer/producer does not share a community of interest with the show producers. She is separately supervised by advertising and marketing supervisors. The show producers are supervised by the executive producers and the news director. She does not interchange with show producers or work alongside them. The record indicates she has no work-related contact with the show producers, except on rare occasions where she may fill in for the news promo writer/producer.

The sports promo writer/producer works different hours than the show producers. She produces commercials; the show producers produce a news show. Even the rare news-related duties performed by the sports writer/producer, occasionally writing news promos, are more closely akin to the duties performed by associate producers who write teasers, and not to any of the show producer’s work. Thus she does not share a community of interest with show producers and should not be included in a unit of show producers. *Taft Broadcasting Co.*, 226 NLRB 540 (1976); *WTMJ, Inc.*, 222 NLRB 1111 (1976).

The news promotional writer/producer is responsible for the commercials for KCAL’s newscasts. The commercials include an announcer-read script, music, video and graphics. He spends about half of his work day creating news promos. The other half is spent, among other things, preparing promotions for syndicated programs that air on KCAL.

In the afternoon, the news promo writer/producer prepares three 10-30 second commercials for the news broadcasts. He performs that work on the Paramount sound stage, where the

news department is, but his primary contact is with the executive producers. They tell him what the top news stories are for the day. He then gets additional details about the stories from the executive producer, a reporter, or anyone else in the news department with information about the stories. He uses his judgment and acumen to decide what stories stand the best chance of generating an audience for the evening's newscasts. In creating news commercials, he has little, if any, work-related contact with show producers. He may on occasion speak to them to confirm a fact. Most of his contact, however, is with the executive producers. The news promo writer/producer has never worked in the news department in any capacity. He does not write, edit, deliver or produce newscasts.

The news promo writer/producers' story choices must be approved by an executive producer as to content, and by either the Vice President of Advertising or the On-Air Promotion Manager as to style. Once they are approved, he scripts the commercial. He then directs the crew that shoots and reads the promos. He assembles his promos in the Melrose building and not at the Paramount sound stage.

The commercials written by the news promo writer/producer differ from the "teasers" written by associate producers in terms of polish, effects and style. Teasers are written to be internal to the newscast and to direct viewers to the newscast segment following the commercial break. Promos are written to be placed within commercial breaks. They are more artistic and sophisticated.

While the sports promo writer/producer and the news promo writer/producer clearly share a strong community of interest, that community of interest is not shared with the show producers. The promo writer/producers are supervised by advertising and marketing supervisors. The show producers are supervised by executive producers and the news director. Moreover, neither promo writer/producer interchanges with show producers or works alongside them. The news promo writer/producer's work-related contact with show producers is generally very limited. The promo writer/producers work different hours than the show producers. They produce commercials; show producers produce a news show. The record indicates that at least within the last ten years no promo writer/producer has come from or moved to the news department. Based upon all these factors, I cannot

conclude that the sports and news promo writer/producers share a sufficient community of interest with show producers to be included in the show producers unit.

G. SENIOR SPORTS PRODUCERS

The Petitioner had originally sought that the position of senior sports producer be included in the unit. In its brief, Petitioner states that it no longer seeks that position to be included as it concedes the position seems to be supervisory.

There are approximately seven employees in the show producers unit found appropriate and two employees in the promotional writer/producers unit found appropriate.

4. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the elections when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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